ARAB-MALAYSIAN FINANCE BHD

v.

STEVEN PHOA CHENG LOON & ORS

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
RICHARD MALANJUM JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NOS: W-01-68-2000, W-01-67-2000, W-01-69-2000 & W-02-602-2000]
3 DECEMBER 2002

TORT: *Negligence - Collapse of high-rise block of apartments - Loss in value of neighbouring blocks of apartments - Appeal by defendants against liability - Whether defendants owed a duty of care - Whether they breached duty - Whether there was causation - Remoteness of damage - Pure economic loss - Whether recoverable - Whether recoverable if reasonably foreseeable*

CIVIL PROCEDURE: *Pleadings - Departure from - Judge decided on issue against defendant that was not raised in pleadings - Whether judge erred - Whether defendants had, by conduct, entered upon issue during evidence and argument - Whether defendants were not prejudiced*

TORT: *Negligence - Title to sue - Collapse of high-rise block of apartments - Claim by residents/plaintiffs of neighbouring blocks for loss in value - Whether they had title to sue - Whether possessory titles sufficient*

TORT: *Negligence - Local authority - Breach of duty of care - Indemnity -Whether s. 95(2) Street, Drainage and Building Act 1974 applicable - Whether action barred by limitation*

TORT: *Nuisance - Failure to maintain drains - Failure thereof led to landslide causing collapse of high-rise block of apartments - Whether a case of actionable nuisance - Loss in value of neighbouring blocks of apartments - Whether recoverable - Remoteness of damage - Whether test of reasonable foreseeability*

In the residential area of Taman Hillview, Ulu Kelang Ampang, stood three high rise blocks of apartments called Block 1, Block 2 and Block 3. After continuous rainfall, Block 1 collapsed in which many people lost their lives. It was a national tragedy. The residents of Blocks 2 and 3 brought an action

against 10 defendants. The substance of their complaint was for loss in value of the said blocks due to the collapse of Block 1. They based their cause of action principally in negligence and nuisance. The trial judge held some of the defendants liable and dismissed the action against the remaining ones. The defendants who were held liable now appealed to this court. They were the third defendant (the engineer), the fourth defendant (the local authority), the fifth defendant (the owner of the land directly behind the said blocks), the seventh defendant (the owner of the higher land adjacent to the fifth defendant's land) and the eighth defendant (who provided management services to the seventh defendant).

The fifth defendant proceeded with its appeal first and its submissions on all issues of law and fact were adopted by the other defendants save for those matters of particular concern to them.

The issues were: (1) whether there was a breach of duty to take care; (2) whether causation was established; (3) whether pure economic loss was recoverable; (4) whether the trial judge was correct to have found that water was the main cause of the landslide that led to the collapse of Block 1 when neither parties had pleaded so; (5) whether the plaintiffs had title to sue; (6) whether the trial judge's apportionment of liability was correct; (7) whether the whole judgment could be enforced against any one defendant; (8) whether the action against the fourth defendant was barred by limitation; (9) whether the fourth defendant was liable pre and post-collapse, and (10) whether s. 95(2) of the Street, Drainage and Building Act 1974 applied to indemnify the fourth defendant from pre-collapse liability.

Held:

Per Gopal Sri Ram JCA

[1] In the absence of any contractual relations between the parties, the Atkinian test in *Donoghue v. Stevenson* applied to determine whether in the given circumstances a duty of care was owed by the particular defendant to the particular plaintiff. Whether a duty of care is owed by a defendant to a plaintiff in a given case is to be resolved in accordance with the facts and circumstances of the case. (pp 601 b-h & 602 a-f)

[2] A person in actual occupation of land or if it is unoccupied land, then its owner, is liable in negligence if he permits the land to become a danger to occupiers of neighbouring lands. The trial judge was right in holding that the fifth defendant owed a duty of care to the plaintiffs. There was abundant evidence before him to show that in

the circumstances of the case, the fifth defendant had knowledge or means of knowledge that its land was in such a state that if a landslide occurred, it would cause harm to neighbouring lands down-slope. (pp 602 h & 603 a)

[3] The test as to what constitutes a breach of duty to take care is formulated in *Blyth v. Birmingham Waterworks Co.* and is a pure question of fact. This court would not interfere with a trial court's findings of fact based on the credibility of evidence unless it was satisfied that the primary trier of fact did not seize the audio-visual advantage he enjoyed. Based on the evidence, the trial judge was entirely correct in holding that the fifth defendant had acted in breach of the duty of care owed to the plaintiffs. It was entirely a misconception to describe the fifth defendant as a passive landowner. The facts of the case showed that the fifth defendant had acted negligently. (pp 604 c-h & 605 a-g)

[4] On the issue of causation, the trial judge found water to be the major cause of the landslide and that it emanated from the fifth defendant's land. This was a case in which there was a mass of evidence. The trial ran for several months. Many issues were hotly contested. Most, if not all, witnesses were subjected to intense cross-examination. The trial judge extracted only those points salient to the issues before him. Having read and re-read the evidence on the point of causation, this court was satisfied that it would have come to the same conclusion as the trial judge. (p 605 h)

[5] On remoteness of damage, the test applicable was one of reasonable foreseeability. The authorities show that the kind of harm must be reasonable foreseeable by the negligent defendant. Once the kind of harm is foreseeable, then the tortfeasor is liable to the full extent of it. Whether a particular kind of harm was reasonably foreseeable was a question of fact that depended upon the peculiar facts of each case. (pp 606 b-h & 607 a-c)

[6] Pure economic loss is recoverable. Under the Atkinian doctrine, loss of any type or description is recoverable, provided that it is reasonably foreseeable. It is not the nature of the damage in itself, whether physical or pure financial loss that is determinative of remoteness. The critical question is whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind that a plaintiff claims to have sustained, whether it be pure economic loss or injury to person or property. However, the trial judge did not

ask himself the question of whether pure economic loss to the plaintiffs was reasonably foreseeable by the fifth defendant or any of the defendants. He held that as a matter of policy he could award pure economic loss. He was wrong to have done so. The cases of *Dr Abdul Hamid Rashid v. Jurusan Malaysian Consultants* and *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* were wrongly decided and overruled. (p 609 a-h)

[7] The facts showed that it was within the reasonable foresight of the defendants that in the event of a landslide, some economic loss would ensue to the plaintiffs. As such, the kind of harm suffered by the plaintiffs was reasonably foreseeable. The defendants were therefore liable to the full extent of it. And that extent was the loss in value of their apartments in Blocks 2 and 3 in consequence of the collapse of Block 1. The trial judge's award for several other damages, such as, vandalism, theft by unknown parties, etc was far too remote. These losses were disallowed. (p 610 a-d)

[8] The trial judge had not gone on a frolic of his own when he found for the plaintiffs that water was the main cause of the landslide although neither side had pleaded so. The fifth defendant had, by its conduct, clearly entered upon the very issue both during evidence as well as in the argument. It therefore suffered no prejudice whatsoever from the basis on which the trial judge had approached the case and found for the plaintiffs. (p 612 f)

[9] A mere possessory title would suffice for a plaintiff to succeed in the tort of negligence for damage to his immovable property. The requirement of exclusive possession herein was amply satisfied. Although the plaintiffs had assigned their sale agreements to various lending institutions they always had exclusive possession of their property. Therefore, the plaintiffs had sufficient title to sue in the tort of negligence. (p 613 d-g)

[10] The question of apportionment of blame for an event is very much a matter for the primary trier of fact and it is a matter within his discretion. An appellate court will not interfere with his view unless it can be demonstrated to a conviction that he was wrong. After an examination of the evidence in the record of appeal, this court was satisfied that the trial judge's assessment was correct, *ie*, that the fifth defendant was 30% liable herein. (p 614 b-d)

[11] The fifth defendant's argument that it was not a joint tortfeasor and so not liable to foot the whole bill before seeking contribution from the co-defendants, could not be accepted. The plaintiffs were entitled as a matter of law to enforce the whole judgment against any of the defendants, including the fifth defendant. (pp 614 e-h & 615 a-f)

[12] A duty on the fourth defendant to act in a particular manner towards the property of the plaintiffs post-collapse must find its expression in public and not private law. Accordingly, the proper method is to proceed by way of an application for judicial review. The substance of the order made against the fourth defendant for post-collapse liability appeared to demand constant supervision. Though that might not be a complete bar to the grant of a mandatory order, it was nevertheless a relevant consideration that must be kept in the forefront of the judicial mind. Therefore, as such a duty alleged to exist could not be enforced in private law proceedings, the trial judge's finding on post-collapse liability should be set aside. (p 616 a-c)

[13] There is no proposition of law that a local authority such as the fourth defendant does not owe a common law duty of care to a third party. It all depends on the particular circumstances. Section 95(2) of the Street Drainage and Building Act 1974 was not applicable to indemnify the fourth defendant for pre-collapse liability. This was because the fourth defendant directed the carrying out of certain works thereby creating a danger to the plaintiffs' property. The indemnity granted by the trial judge to the fourth defendant should be set aside and the fourth defendant was liable to the plaintiffs in the tort of negligence. Also, the kind of harm that was foreseeable by the fifth defendant was equally foreseeable by the fourth defendant. (pp 617 b & 619 d)

[14] The action against the fourth defendant was not barred by limitation, in particular by the Public Authorities Protection Act 1948 as this was a case of continuing harm. The authority in support of this view is *Mak Koon Yong & Anor v. Municipal Councillors, Malacca.* (p 619 f-g)

[15] This court did not agree that the third, seventh and eighth defendants ought to have been absolved from any blame. Their respective roles in the events that led to the tragedy had been dealt with in sufficient detail. There was no error in the way in which the judge dealt with their cases. (p 620 e)

[16] Pure economic loss in the form of the fall in the value of the land is recoverable for any of the forms of nuisance recognised by the law. That the fifth defendant failed to maintain the drains in question amounted to a nuisance was established by the leading case of *Sedleigh Denfield v. O' Callaghan*. The test of remoteness is the same as that in negligence. (pp 621 h & 622 a-e)

[Appeals dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Di kawasan kediaman Taman Hillview, Ulu Kelang Ampang terdapat tiga blok apartmen tinggi yang dipanggil Blok 1, Blok 2 dan Blok 3. Selepas beberapa hari hujan turun tidak berhenti-henti, Blok 1 runtuh mengakibatkan ramai orang yang hilang nyawa. Ia merupakan satu tragedi nasional. Seterusnya, residen-residen Blok 2 dan Blok 3 membawa satu tindakan terhadap sepuluh defenden-defenden atas alasan bahawa Blok 2 dan Blok 3 tidak bernilai lagi akibat keruntuhan tersebut. Tindakan mereka berdasarkan terutamanya atas tort kecuaian dan kacau ganggu. Hakim bicara mendapati beberapa defenden-defenden tersebut bertanggungan dan menolak tindakan terhadap lain-lain defenden. Defenden-defenden yang didapati bertanggungan kini merayu kepada mahkamah ini. Mereka adalah defenden ketiga (jurutera berkenaan), defenden keempat (pihak berkuasa tempatan), defenden kelima (pemilik tanah belakang blok-blok tersebut), defenden ketujuh (pemilik tanah yang lebih tinggi berdekatan dengan tanah defenden kelima) dan defenden kelapan (pihak yang membekalkan perkhidmatan pengurusan kepada defenden ketujuh).

Defenden kelima meneruskan dengan rayuannya terlebih dahulu dan penghujahan-penghujahannya atas semua isu undang-undang dan fakta terpakai kepada defenden-defenden lain kecuali perkara-perkara berkenaan mereka sendiri.

Isu-isunya adalah: (1) sama ada terdapat perlanggaran kewajipan berjaga-jaga; (2) sama ada terdapatnya "causation"; (3) sama ada "pure economic loss" iaitu kerugian ekonomi bersih boleh diperolehi kembali; (4) sama ada hakim bicara adalah betul apabila beliau mendapati bahawa air adalah sebab utama berlakunya longgokan tanah yang menggelongsor turun mengakibatkan keruntuhan Blok 1 walaupun pihak-pihak tidak memplidkan isu tersebut; (5) sama ada plaintif-plaintif mempunyai hak untuk mendakwa; (6) sama ada pengumpukan liabiliti oleh hakim bicara adalah betul; (7) sama ada keseluruhan penghakiman boleh dikuatkuasakan terhadap mana-mana satu defenden; (8) sama ada tindakan terhadap defenden keempat dihalang oleh had masa; (9) sama ada defenden keempat bertanggungan sebelum dan

selepas keruntuhan Blok 1; dan (10) sama ada s. 95(2) Akta Jalan, Parit dan Bangunan 1974 terpakai untuk menanggung rugi defenden keempat daripada liabiliti sebelum keruntuhan Blok 1.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Apabila tidak ada perhubungan kontraktual di antara pihak-pihak berkenaan, ujian Atkinian terpakai untuk menentukan sama ada dalam keadaan yang sedia ada defenden mempunyai kewajipan berjaga-jaga kepada plaintif. Sama ada terdapatnya kewajipan berjaga-jaga dalam sesuatu kes mestilah ditentukan mengikut fakta dan keadaan kes tersebut.

[2] Seseorang yang menduduki tanah atau jika tanah itu tidak diduduki, pemiliknya, adalah bertanggungan dalam tort kecuaian jika ia membiarkan tanah tersebut membahayakan penghuni-huni tanah berdekatan. Dalam pada itu, hakim bicara adalah betul apabila beliau memutuskan bahawa defenden kelima mempunyai kewajipan berjaga-jaga kepada plaintif-plaintif. Terdapat banyak keterangan yang menunjukkan bahawa dalam keadaan kes tersebut, defenden kelima berpengetahuan atau ada cara untuk mengetahui bahawa jika berlakunya longgokan tanah yang menggelongsor turun, tanahnya akan membahayakan tanah-tanah berjiran.

[3] Ujian untuk menentukan sesuatu perlanggaran kewajipan berjaga-jaga dirumuskan dalam kes *Blyth v. Birmingham Waterworks Co.* dan ia adalah satu soalan fakta. Mahkamah ini tidak akan bercampur tangan dalam keputusan fakta mahkamah bicara berdasarkan kebolehpercayaan keterangan kecuali jika ia berpuas hati bahawa hakim bicara tidak mengambil kesempatan audio visual yang sedia ada. Hakim bicara betul dalam keputusannya bahawa defenden kelima telah melanggar kewajipan berjaga-jaganya kepada plaintif-plaintif berdasarkan keterangan yang sedia ada. Defenden kelima bukan pemilik yang pasif. Malah fakta-fakta kes menunjukkan bahawa defenden kelima telah bertindak dengan cuai.

[4] Atas isu 'causation', hakim bicara mendapati bahawa air adalah sebab utama berlakunya longgokan tanah menggelongsor turun dan ia berpunca daripada tanah defenden kelima. Kes ini adalah satu kes berasaskan banyak keterangan. Perbicaraan telah berjalan untuk beberapa bulan. Banyak isu yang diperdebatkan. Kebanyakan saksi-saksi didedahkan kepada pemeriksaan balas yang intensif. Hakim

bicara hanya mengambil hujah-hujah yang penting kepada isu-isu di hadapannya. Atas keterangan berkenaan, mahkamah bersependapat sama dengan hakim bicara atas isu ini.

[5] Ujian untuk isu kerosakan luar duga adalah "reasonable foreseeability" (jangkaan munasabah). Autoriti menunjukkan bahawa jenis kerosakan tersebut mestilah dalam jangkaan munasabah defenden yang cuai. Apabila jenis kerosakan tersebut dalam jangkaan munasabahnya, pelaku tort bertanggungan sepenuhnya. Sama ada jenis kerosakan dalam jangkaan munasabah adalah satu soalan fakta yang bergantung kepada fakta kes masing-masing.

[6] Kerugian ekonomi bersih boleh diperolehi kembali. Di bawah doktrin Atkinian, kerugian mana jenis pun boleh diperolehi kembali asalkan ia dalam jangkaan munasabah. Bukanlah sifat kerosakannya, sama ada kerugian fizikal atau kewangan semata-mata yang menentukan keluardugaan. Soalan kritikal adalah sama ada kewajipan berjaga-jaga melingkungi jenis kerosakan yang plaintif mendakwa mengalami, sama ada kerugian ekonomi bersih atau kecederaan kepada orang atau hartabenda. Tetapi hakim bicara tidak mempersoalkan sama ada kerugian ekonomi bersih kepada plaintif-plaintif dalam jangkaan munasabah defenden kelima atau mana-mana defenden. Malah beliau memutuskan bahawa beliau boleh mengawadkan kerugian ekonomi bersih secara polisi. Beliau adalah salah untuk memutuskan begitu. Kes-kes *Dr Abdul Hamid Rashid v. Jurusan Malaysian Consultants* dan *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* adalah salah diputuskan dalam hal ini dan harus ditolak.

[7] Fakta-fakta kes menunjukkan bahawa ia adalah dalam jangkaan munasabah defenden-defenden bahawa jika berlakunya longgokan tanah menggelongsor turun, plaintif-plaintif tentu akan mengalami kerugian ekonomi. Dengan itu, jenis kerosakan yang dialami oleh plaintif-plaintif adalah dalam jangkaan munasabah defenden-defenden. Maka defenden-defenden bertanggungan sepenuhnya dan kerugiannya adalah dalam kehilangan nilai apartmen-apartmen Blok 2 dan Blok 3 akibat keruntuhan Blok 1. Awad hakim bicara untuk gantirugi lain seperti "vandalism", pencurian oleh pihak-pihak yang tidak diketahui, dll, terlalu terpencil. Kerugiannya tidak patut dibenarkan.

[8] Keputusan hakim bicara bagi pihak plaintif bahawa air merupakan sebab utama berlakunya longgokan tanah menggelongsor turun, walaupun tidak diplid oleh mana-mana pihak, tidak memprejudiskan defenden kelima. Defenden kelima telah mengambil bahagian dalam keterangan dan pembahasan isu tersebut.

[9] Sesuatu hakmilik pemilikan memadai bagi plaintif berjaya dalam tuntutan tort kecuaian untuk gantirugi harta tak alih. Keperluan milikan eksklusif dalam kes ini dipenuhi dengan secukupnya. Walaupun plaintif-plaintif telah menyerahhak perjanjian jual-beli mereka kepada institusi-institusi pinjaman wang, mereka senantiasa mempunyai milikan eksklusif harta mereka. Maka, plaintif-plaintif mempunyai milikan cukup untuk mendakwa dalam tort kecuaian.

[10] Soalan pengumpukan bagi kesalahan sesuatu kejadian adalah satu perkara yang memerlukan perbicaraan fakta-fakta dan ianya adalah dalam budi bicara hakim bicara. Mahkamah rayuan tidak akan masuk campur dalam keputusan beliau kecuali jika dibuktikan yang hakim itu adalah salah. Setelah memeriksa keterangan dalam rekod rayuan, mahkamah ini berpuas hati bahawa penilaian hakim bicara bahawa defenden kelima adalah 30% bertanggungan adalah betul.

[11] Penghujahan defenden kelima bahawa ia bukan pelaku tort bersama dan dengan itu tidak bertanggung untuk membayar bil keseluruhannya sebelum meminta sumbangan daripada defenden lain, tidak boleh diterima. Plaintif berhak dari segi undang-undang untuk menguatkuasakan keseluruhan penghakiman tersebut terhadap mana-mana defenden termasuk defenden kelima.

[12] Kewajipan defenden keempat terhadap hartabenda plaintif-plaintif selepas keruntuhan Blok 1 termasuk dalam undang-undang awam dan bukan undang-undang persendirian. Seterusnya, caranya adalah melalui permohonan semakan kehakiman. Perintah terhadap defenden keempat bagi tanggungan selepas keruntuhan Blok 1 merupakan perintah yang memerlukan penyeliaan yang berlanjutan. Walaupun itu bukanlah satu penghalang kepada perintah mandatori, namun ia adalah satu pertimbangan yang releven. Maka, oleh kerana kewajipan yang didakwa ada tidak boleh dikuatkuasakan dalam prosiding undang-undang persendirian, keputusan hakim bicara mengenai tanggungan defenden keempat selepas keruntuhan harus diketepikan.

[13] Tidak ada undang-undang yang menetapkan bahawa pihak berkuasa tempatan seperti defenden keempat tidak bertanggungjawab dalam common law kepada pihak ketiga. Ia semuanya bergantung kepada keadaan tertentu. Seksyen 95(2) Akta Jalan, Parit dan Bangunan 1974 tidak terpakai untuk memberi indemniti kepada defenden keempat bagi tanggungan sebelum keruntuhan. Ini adalah kerana defenden keempat mengarahkan perjalanan kerja-kerja tertentu yang telah membahayakan harta benda plaintif-plaintif. Dengan itu, indemniti yang diberikan oleh hakim bicara harus diketepikan dan seterusnya defenden keempat

bertanggung kepada plaintif-plaintif dalam tort kecuaian. Juga, jenis bahaya dalam jangkaan defenden kelima juga dalam jangkaan defenden keempat.

[14] Tindakan terhadap defenden keempat tidak dihalang oleh had masa, terutamanya oleh Akta Perlindungan Pihak Berkuasa Awam 1948 kerana ianya adalah kerosakan yang berlanjutan. Autoriti menyokong pandangan ini adalah kes *Mak Koon Yong & Anor v. Municipal Councillors, Malacca.*

[15] Mahkamah ini tidak bersetuju bahawa defenden-defenden ketiga, ketujuh dan kelapan sepatutnya dilepaskan dari tanggungan. Peranan mereka masing-masing dalam kejadian-kejadian yang membawa kepada tragedi tersebut telah ditentukan dengan cukup perinci. Tiada kesalahan dalam cara hakim bicara menyelesaikan kes mereka.

[16] Kerugian ekonomi bersih iaitu kerugian dalam nilai tanah boleh diperolehi kembali dalam apa jenis kacau ganggu yang diiktiraf undang-undang. Mengikut kes *Sedleigh Denfield v. O' Callaghan*, kegagalan defenden kelima menjaga parit-parit berkenaan jatuh di bawah tort kacau ganggu. Ujian untuk keluardugaan bagi tort kacau ganggu adalah sama dengan tort kecuaian.

Rayuan-rayuan ditolak.]

Case(s) referred to:

Antoniades v. Villiers [1988] 3 All ER 1058 ***(foll)***
Barrett v. Enfield London Borough Council [1999] 3 All ER 193 ***(foll)***
Blyth v. Birmingham Waterworks Co [1856] 11 Exch 781 ***(foll)***
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***
Bourhill v. Young [1942] 2 All ER 396 ***(refd)***
Canadian National Railway Co v. Norsk Pacific Steamship Co [1992] 1 SCR 1021 ***(refd)***
Clarke v. Edinburgh Tramways [1919] SC (HL) 35 ***(refd)***
Collector of Land Revenue v. Alagappa Chettiar [1971] 1 MLJ 43 ***(foll)***
Donoghue v. Stevenson [1932] AC 562 ***(foll)***
Doughty v. Turner Manufacturing Co Ltd [1964] 2 WLR 240 ***(refd)***
Dr Abdul Hamid Rashid v. Jurusan Malaysian Consultants [1999] 8 CLJ 131 HC ***(ovrd)***
Eng Thye Plantations Bhd v. Lim Heng Hock & Ors [2001] 4 CLJ 245 CA ***(refd)***
Fardon v. Harcourt-Rivington [1932] 146 LT 391 ***(refd)***
Government of Malaysia & Ors v. Jumat Mohamed & Anor [1977] 2 MLJ 103 ***(refd)***
Hj Mohamed Dom v. Sakiman [1956] MLJ 45 ***(refd)***
Hughes v. Lord Advocate [1963] AC 837 ***(refd)***

Hunter v. Canary Wharf Ltd [1997] 2 WLR 684 ***(foll)***
Jaswant Singh v. Central Electricity Board & Anor [1967] 1 MLJ 272 ***(refd)***
Jolley v. Sutton London Borough Council [2000] 1 WLR 1082 ***(refd)***
Kane v. New Forest District Council [2001] 3 All ER 914 ***(foll)***
KEP Mohamed Ali v. KEP Mohamed Ismail [1981] 2 MLJ 10 ***(foll)***
Lembaga Kemajuan Tanah Persekutuan v. Mariam [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197 FC ***(refd)***
Lim Kar Bee v. Abdul Latif Ismail [1978] 1 MLJ 109 ***(refd)***
Ling Nam Rubber Works v. Leong Bee & Co [1968] 1 MLJ 216 ***(refd)***
Mak Koon Yong & Anor v. Municipal Councillors, Malacca [1967] 1 MLJ 256 ***(foll)***
Malaysian National Insurance Sdn Bhd v. Lim Tiok [1997] 2 CLJ 351 SC ***(foll)***
Murphy v. Brentwood District Council [1990] 2 All ER 908 ***(refd)***
Oli Mohamed v. Keith Murphy & Anor [1969] 2 MLJ 244 ***(foll)***
Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyd's Rep 403 ***(refd)***
Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor [1998] 8 CLJ 403 HC ***(ovrd)***
Powel and Wife v. Streatham Manor Nursing Home [1935] AC 243 ***(refd)***
PP v. Kang Ho Soh [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 HC ***(refd)***
Re Polemis [1921] 3 KB 560 ***(refd)***
Sedleigh Denfield v. O'Callaghan [1940] AC 880 ***(refd)***
Sivalingam Perisamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Smith v. Littlewoods Ltd [1987] 2 WLR 480 ***(refd)***
Spartan Steel & Alloys Ltd v. Martin & Co (Contractors) Ltd [1972] 3 All ER 557 ***(refd)***
Street v. Mountford [1985] 2 All ER 289 ***(refd)***
Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(foll)***
The Aliakmon [1986] 2 All ER 145 ***(foll)***
The Wagon Mound [1961] AC 388 ***(foll)***
Trustees of the Dennis Rye Pension Fund & Anor v. Sheffield City Council [1997] 4 All ER 747 ***(refd)***
Woods v. Duncan [1946] AC 401 ***(refd)***
Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Ors [1999] 4 CLJ 339 HC ***(foll)***

Legislation referred to:
Street, Drainage and Building Act 1974, s. 95(2)

(Civil Appeal No: W-01-68-2000)
For the appellant - Cecil Abraham (Dhinesh Bhaskaran & Miriam George); M/s Shearn Delamore & Co
For the 1st-73rd respondents - Rajendra Navaratnam (Yatiswara Ramachandran & Darian Yoong); M/s Azman Davidson & Co
For the 74th respondent - Rohatul Akhmar; Jabatan Pemegang Harta
For the 76th respondent - Melvin Selvam; M/s Jagjit & Co
For the 77th respondent - VS Viswanathan; M/s VS Viswa & Co

(Civil Appeal No: W-01-67-2000)
For the appellant - VS Viswanathan; M/s VS Viswa & Co
For the 1st-73rd respondents - Rajendra Navaratnam (Yatiswara Ramachandran & Darian Yoong); M/s Azman Davidson & Co
For the 74th respondent - Rohatul Akhmar; Jabatan Pemegang Harta
For the 76th respondent - Melvin Selvam; M/s Jagjit & Co
For the 77th respondent - Cecil Abraham (Dhinesh Bhaskaran & Miriam George); Shearn Delamore & Co

(Civil Appeal No: W-01-69-2000)
For the appellant - Yap Mow Jiun; M/s Heng & Mogan
For the 1st-73rd respondents - Rajendra Navaratnam (Yatiswara Ramachandran & Darian Yoong); M/s Azman Davidson & Co
For the 74th respondent - Rohatul Akhmar; Jabatan Pemegang Harta
For the 76th respondent - Melvin Selvam; M/s Jagjit & Co
For the 77th respondent - VS Viswanathan; M/s VS Viswa & Co
For the 78th respondent - Cecil Abraham (Dhinesh Bhaskaran & Miriam George); M/s Shearn Delamore & Co

(Civil Appeal No: W-02-62-2000)
For the appellant - Melvin Selvam; M/s Jagjit & Co
For the 1st-73rd respondents - Rajendra Navaratnam (Yatiswara Ramachandran & Darian Yoong); Azman Davidson & Co
For the 74th respondent - Rohatul Akhmar; Jabatan Pemegang Harta
For the 76th respondent - VS Viswanathan; M/s VS Viswa & Co
For the 77th respondent - Cecil Abraham (Dhinesh Bhaskaran & Miriam George); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: SS-21-174-1996]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA (Judgment Of The Court):

Facts And Background

We must say at the very outset that after hearing full argument over four days, we find these appeals to be tolerably plain. They entail no new point of policy or principle. At the end of the day this is merely a case calling for an application of settled law to particular facts. And a brief narrative of those facts is as follows.

Along Jalan Ulu Kelang there is a residential area known as Taman Hillview. It comprises of bungalows and high rise apartments. At all times material to the present litigation there were three tower blocks that stood there. They were called Block 1, 2 and 3. They stood in fairly close

proximity to each other. They were all constructed between 1975 and 1978. The trial judge treated them for the purposes of the present litigation as a single unit. All before us are agreed that they should be so treated. Behind these three blocks is a hill. There is a stream that flows along it. At one time that stream used to flow its course.

On 11 December 1993, after continuous rainfall for the preceding ten days, Block 1 collapsed. Many people lost their lives in consequence. It had a serious impact on people of all walks of life. The trial judge called it a national tragedy.

The residents of Blocks 2 and 3 brought an action against ten defendants. The substance of their plaint was that their apartments in Blocks 2 and 3 had become worthless because of the collapse of Block 1. They based their cause of action principally in negligence and nuisance. The judge dismissed their action against some of the defendants. The remaining defendants who were found liable have appealed to us. They are the 3rd defendant (the engineer), the 4th defendant (the local authority), the 5th defendant (the owner of the land directly behind the towers), the 7th defendant (the owner of the higher land adjacent to the 5th defendant's land) and the 8th defendant (who provides management services to the 7th defendant). In all, four appeals were lodged. They were taken together. We find it convenient to refer to the parties according to the titles assigned to them in the court below.

We must also mention that counsel before us agreed that the 5th defendant should go forward with its appeal first. It was also agreed that the submissions made by counsel for the 5th defendant on all issues of law and fact would be adopted by counsel for the other defendants save those matters of particular concern to each of the other defendants. With these remarks, we now turn to consider the specific complaints addressed to us. This is what we propose to do. We will first set out and deal with those matters that are common to all the defendants before us. After that, we will deal with any point specific to a particular defendant. But before we do that, we must remind ourselves of our function as an appellate court.

The Appellate Approach

There are several statements of high authority as to the proper approach that a court of appeal should adopt towards the exercise of its appellate power in a case as the present. These cases fall into two broad categories. First, those that set out the general rule, and second, those that provide broad cases of exceptions. As to the general rule, there are numerous decisions in point. But we find it sufficient to quote from only two of them.

In *Clarke v. Edinburgh Tramways* [1919] SC (HL) 35 at p. 36, Lord Shaw of Dunfermline, in a passage referred to on numerous occasions by our courts, said:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the trial judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them or heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice, in the ordinary case, things are more evenly divided: witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them, which can never be reproduced in the printed page. What in the circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: am I – who sit here without the advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

The second case is *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243, 249 where Viscount Sankey LC said this:

> What then should be the attitude of the Court of Appeal towards the judgment arrived at in the court below under such circumstances as the present? It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing court. There are different meanings to be attached to the word 'rehearing'. For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a

> verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way.

So, it may be seen that as a general rule appellate interference is only in rare cases. Whether a particular case is a "rare case" depends on its nature. And we would emphasise that the categories of cases in which appellate interference is warranted is not closed though there already exists a list of established categories in which appellate interference may be warranted. It is unnecessary for us to go through all of them here. We need only make reference to three authorities on the point.

The first is *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 where this court said:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

The second is *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17:

> It is trite that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

The third is *Onassis and Calogeropoulos v. Vergottis* [1968] 2 Lloyd's Rep 403 at p. 430, where Lord Pearce in his dissenting speech said:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right,

> namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

It is with these principles in mind that we now turn to address these appeals.

The Claim In Negligence

The High Court found liability in negligence against the defendants now before us. Mr Abraham of counsel for the 5th defendant submits that the trial judge was wrong. Counsel has argued that his client was at all material times a bare and inactive landlord. He concedes that as the owner of the land in question, the 5th defendant does owe a duty of care to other land users or owners in the immediate vicinity. However, he says that the trial judge imposed too high a burden on the 5th defendant. He also submits that the trial judge erred in finding that his client had breached the duty of care owed by it to the plaintiffs. Finally, he argues that the damage suffered by the plaintiffs is too remote in law, that is to say, that it was not reasonably foreseeable by the 5th defendant. These arguments of counsel require us to hearken back to first principles.

To make out a case against a defendant in the tort of negligence, a plaintiff must establish four ingredients. First, he must show that he was owed a duty by the defendant to take reasonable care. Second, that the defendant breached that duty, third, that the resultant breach caused the harm in question and fourth that he (the plaintiff) suffered damage that is not too remote. There is a tendency on the part of some textbook writers (in the interest of tidiness) to treat each of these elements in watertight compartments. Such an approach may be quite misleading. This is because what a court trying an action for negligence is concerned with is the interpretation of a particular set of facts as establishing or negativing one or more of the ingredients of the tort. The speeches made in the House in *Woods v. Duncan* [1946] AC 401 illustrates the point.

So does (with one reservation) the following passage in the judgment of the Lord Denning MR in *Spartan Steel & Alloys Ltd v. Martin & Co (Contractors) Ltd*. [1972] 3 All ER 557, 562:

> The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think the

> time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable.

The reservation we seek to make in relation to the view expressed by the Master of the Rolls is in relation to policy. It is a matter upon which our views will be expressed later in this judgment.

Duty Of Care

Taking the first ingredient, the starting point in all cases where there is absent any contractual relations between the parties is the following well-known passage in the speech of Lord Atkin in *Donoghue v. Stevenson* [1932] AC 562, 580:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Our courts have traditionally applied the Atkinian test to determine whether in given circumstances a duty was owed by the particular defendant to the particular plaintiff. See, for example, the judgment of Raja Azlan Shah FJ (as he then was) in *Lim Kar Bee v. Abdul Latif bin Ismail* [1978] 1 MLJ 109.

Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Ors [1999] 4 CLJ 339 correctly applied the test to occupiers of adjoining land. We approve of what Kang Hwee Gee J there said:

> That a duty of care situation existed between the first defendant operator and the plaintiff is plain and obvious. The plaintiff was the first defendant's neighbour in the literal sense of the word. He was the occupier of the land adjoining the quarry. He was clearly within that category of persons whom Lord Atkin in the celebrated case of *M'Alister (or Donoghue) (pauper) v. Stevenson* [1932] AC 562 described as:
>
> > persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The significance of the Atkinian doctrine was reiterated by Salleh Abas CJ (M) in *Lembaga Kemajuan Tanah Persekutuan v. Mariam* [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197:

> As to the issue of negligence, Felda did not know that the contractor in breach of the agreement with Felda had sub-contracted the work. Counsel for Felda, therefore, submitted that as the subcontract was unauthorised, the sub-contractor's employee, ie, the deceased, must in the circumstances of the case be a trespasser and as such Felda owed him no duty of care at all.
>
> With respect, we disagree. The submission seems to us to be an attempt to revive a notion which had long been discarded in that tortious liability depends upon contractual relationship and that since Felda and the deceased had no contractual relationship with each other, Felda therefore owed no duty of care to him at all.
>
> This notion was abandoned in England by the House of Lords in *Donoghue v. Stevenson* [1932] AC 562, 580 and it was, to paraphrase Professor Winfield, given a 'decent burial' by the Privy Council in *Grant v. Australian Knitting Mills Ltd* [1936] AC 85, 101-102. An attempt to revive it was repelled by Lord Denning in *Greene v. Chelsea Borough Council* [1954] 2 QB 127, 138. These cases establish that a person owes a duty of care even to persons who have no contractual relationship with him, and that his liability to an injured person depends upon whether the injury was caused by his act or omission. **It is the nature of his act and omission that makes him liable**. (emphasis added).

The effect of the authorities applying *Donoghue v. Stevenson* is that the question whether a duty of care is owed by a defendant to a plaintiff in a given case is to be resolved in accordance with the facts and circumstances of that case: *Canadian National Railway Co. v. Norsk Pacific Steamship Co.* [1992] 1 SCR 1021.

Mr. Abraham submitted that generally speaking the duty on the owner of alienated land – and it is to such land only that we refer to in this judgment – is to ensure that his land does not fall into such a state as would reasonably constitute a danger to the occupiers of lands in the vicinity. We agree. In our judgment, the aforesaid duty is consonant with the responsibility of the user of a particular environment to other users of the same environment: *Eng Thye Plantations Bhd v. Lim Heng Hock & Ors* [2001] 4 CLJ 245. So, a person in actual occupation of land, or, if it is unoccupied land, then its owner is liable in negligence if he permits the land to become a danger to occupiers of neighbouring lands.

Was the trial judge right in holding that the 5th defendant owed a duty of care to the plaintiffs? We think he was. There was abundant evidence before him to show that in the circumstances of this case the 5th defendant had knowledge or means of knowledge that its land was in such a state that if a landslide occurred, it would cause harm to neighbouring lands down-slope. We find it unnecessary to regurgitate the evidence on the point. It has been sufficiently rehearsed in the judgment under appeal. What is not in doubt is the fact that at all material times, the 5th defendant's land carried scars of previous land slips; that Tropic (the 6th defendant who was absolved of liability) had carried out works on the 5th defendant's land; that although the 5th defendant had called a halt to such work, it did nothing to put the land in a safe condition. Having regard to the authorities we find no misdirection in the judgment under appeal.

When dealing with whether the 5th defendant owed the plaintiffs a duty of care the judge said:

> From the factual circumstances as disclosed, I find that the fifth defendant could reasonably foresee that by its acts and/or omissions in failing to take care of its land, it would cause a landslide that would destroy Block 1 and forced the abandonment of Block 2 and 3. When the fifth defendant became associated with the Arab Malaysian land it was in the capacity of a chargee. Before the land was charged, a valuation report – D85 was submitted by the chargor to the fifth defendant. In it was a description of the land with photographs as illustration. These photographs reveal the terrain of the land being extremely steep supported by high rubble retaining walls. From this, the fifth defendant should have been aware of the nature of the land and its venerability to slope failure if unattended. Yet when the fifth defendant became the owner of the said land it was callous in its attitude towards this factor. The fifth defendant officers involved seem to believe that a vacant piece of land need not be bothered with. Though officers of the fifth defendant were sent to inspect the land periodically, they were never concerned with the physical aspect of it; they only concentrated on whether any trespassers had got onto the land. Even on this, I could not comprehend how this could be achieved without going into the land itself, especially when the area, as Miss Seow has described, was covered with vegetation. This attitude and practice seem to continue despite the complaints of the flooding caused by the activities of Tropic. Puan Lutifah, who was sent to investigate only stood at the bottom of the hill to look at the land. She never entered the land to find out what was the cause of the floods. If she had been more concerned and proceeded onto the land she would have discovered the state and condition of the drains, and the drainage of the area which were highly inadequate and unattended to as confirmed by various witnesses who went up to the Arab Malaysian land soon after the collapse of Block 1. Coupled with any

> blockage, such as those caused by Tropic, the land would be a potential danger to those residents living down hill. Such failure and neglect by the fifth defendant servants and/or agents must be attributed to the fifth defendant and be considered as the fifth defendant having known or ought to have known of the consequences for not attending to its land.

For the reasons given earlier we are entirely in agreement with the foregoing views of the trial judge.

The Breach

We have already said that a plaintiff must also prove breach of the relevant duty. As to what constitutes a breach, we would refer to the well-known test formulated by Baron Alderson in *Blyth v. Birmingham Waterworks Co* [1856] 11 Exch 781, 784. He said that negligence is:

> [T]he omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

In *Fardon v. Harcourt-Rivington* [1932] 146 LT 391, 392 Lord Dunedin put it this way:

> If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions … . In other words, people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.

Lastly, in *Bourhill v. Young* [1942] 2 All ER 396, 403 Lord Macmillan formulated the relevant test in this way:

> The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

It really does not matter which of these tests one applies. What is important to bear in mind is that whether there was occasioned a breach of duty in given circumstances is a pure question of fact. Accordingly, in keeping with established principles, this court will not interfere with a trial court's findings of fact based on the credibility of evidence unless it is satisfied that the primary trier of fact did not seize the audio-visual advantage he enjoyed.

Learned counsel for the 5th defendant attempted to demonstrate that the trial judge in the present instance did not judicially appreciate the evidence – in particular the evidence of the 5th defendant's expert – or sufficiently evaluate it. Now, we have examined in detail the areas in the oral and documentary evidence drawn to our attention by counsel and to the several complaints made by him in this respect. Having done so, we are entirely satisfied that there is no merit whatsoever in counsel's complaint.

In our judgment the trial judge was entirely correct in holding that the 5th defendant had acted in breach of the duty of care owed to the plaintiffs. In the first place there is the evidence that prior to works on the land in question by the 5th defendant's predecessor in title, the East stream ran its natural course. Second, there is cogent evidence showing that the course of the East stream was altered to accommodate the proposed development. Third, that part of the alteration of the course of this stream required the construction of drains and their maintenance. Fourth, that the drains in question were in fact maintained in a rudimentary fashion by the staff of the 5th defendant's predecessor in title. Fifth, that during the period of such rudimentary maintenance no difficulty arose from the change in the course of the East stream. Sixth, that after the 5th defendant bought the land, all forms of maintenance ceased. Seventh, that in consequence the drains became clogged and the stream began to find its own course. Lastly, as a matter of pure logical deduction, the effect of the ten days of rainfall must have had a serious effect in the out flow of the stream so that the earth on the 5th defendant's land must have – as found by the trial judge – become saturated with water thereby creating a most serious danger to lower lying lands, including the land on which the 3 Blocks stood.

Accordingly, it is entirely a misconception to describe the 5th defendant as a passive landowner. In truth as a matter of pure fact, it was either the creator of the danger in question through its omission adverted to or did nothing to eliminate that danger. In the circumstances, any reasonable tribunal armed with the facts of this case would have concluded as a fact that the 5th defendant had acted negligently. If the 5th defendant's conduct is not negligence, then we are unable to see what is.

Causation

The trial judge found water to be the major cause of the landslide and that it emanated from the 5th defendant's land. Counsel criticised these findings of the trial court. He relied on the expert and other evidence in support of his argument that the plaintiffs had failed to bring causation to the 5th defendant's doorstep. With respect, we find no merit whatsoever in the criticism made of the judge's reasoning.

This was a case in which there was a mass of evidence. The trial ran for several months. Many issues were hotly contested. Most, if not all, witnesses were subjected to intense cross-examination. The trial judge extracted from the mass only those points salient to the issues before him. Having read and re-read the evidence on the point of causation, we are satisfied that we would have come to the same conclusion as the trial judge.

Remoteness Of Damage

It is settled that a plaintiff can recover only that loss which a defendant could reasonably foresee would ensue to the victim of the tort. So, the test we must apply is one of reasonable foreseeability. Whatever may be the debate in England as to the life hereafter of the direct consequences test in *Re Polemis* [1921] 3 KB 560 after the decision of the Privy Council in *The Wagon Mound* [1961] AC 388, we are by bound by the latter decision. Our courts have in several cases applied the Wagon Mound test of reasonable foreseeability of harm and we are obliged by the doctrine of precedent to follow them. See, for example, *Government of Malaysia & Ors v. Jumat bin Mohamed & Anor* [1977] 2 MLJ 103.

In *Jaswant Singh v. Central Electricity Board & Anor* [1967] 1 MLJ 272, Gill J (as he then was) explained the replacement of the *Re Polemis* test by the *The Wagon Mound* test as follows:

> As regards damage in consequence of a breach of a duty to take care, the fundamental rule is that the injury suffered by the plaintiff must not be too remote a consequence of the defendants' conduct, or, as it is often said, the damage must not be too remote. In this connection, on the authority of the decision of the Court of Appeal in England in the case of *Re Polemis & Furness, Withy & Co Ltd* [1921] 3 KB 560, the rule was that if a reasonable man would have foreseen any damage to the plaintiff as likely to result from the defendant's act, then he was liable for all direct consequences of it suffered by the plaintiff whether a reasonable man would have foreseen them or not, that is, if they were directly traceable to the act and not due to the operation of independent intervening causes. That rule was abrogated by the Judicial Committee of the Privy Council in the case of *Overseas Tankship (UK) Ltd v. Morts Dock & Engineering Co Ltd (The Wagon Mound)*, in which it was decided that 'the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen', and that it is wrong to use one test (reasonable foreseeability) to determine culpability, ie duty and breach of duty, and a different test (directness) to determine remoteness of damage. In other words, the test of remoteness is to be treated as being identical with the test of negligence. The test of duty is foreseeability of some damage to the plaintiff. The test of damage is that the kind and the extent of plaintiff's damage should have been foreseeable in general outline.

Now, what precisely must be foreseeable by a negligent defendant? On the authorities, the answer seems to be that it is the kind of harm that must be foreseen. Once the kind of harm is foreseeable, then the tortfeasor is liable to the full extent of it. So, in *Doughty v. Turner Manufacturing Co Ltd* [1964] 2 WLR 240, the plaintiff failed because, on the facts, injury to the workman by splashing was foreseeable but not injury by explosion. By contrast, in *Hughes v. Lord Advocate* [1963] AC 837, it was a reasonably foreseeable danger that a child could be injured by burns but not through an explosion. Nevertheless, the plaintiff succeeded because the type of harm, namely injury by burning was foreseeable though its extent was not. At first blush there appears some difficulty in reconciling the result in those two cases. But, that is because each turned on its own facts.

So, it comes to this, whether a particular kind of harm was reasonably foreseeable is a question of fact that depends upon the peculiar facts of each case. Thus, in *Jolley v. Sutton London Borough Council* [2000] 1 WLR 1082, 1089, Lord Steyn said:

> Very little needs to be said about the law. The decision in this case has turned on the detailed findings of fact at first instance on the particular circumstances of this case. Two general observations are, however, appropriate. First, **in this corner of the law the results of decided cases are inevitably very fact-sensitive.** Both counsel nevertheless at times invited your Lordships to compare the facts of the present case with the facts of other decided cases. That is a sterile exercise. Precedent is a valuable stabilising influence in our legal system. But, comparing the facts of and outcomes of cases in this branch of the law is a misuse of the only proper use of precedent, *viz.*, to identify the relevant rule to apply to the facts as found.
>
> Secondly, Lord Woolf MR made an observation casting doubt on part of Lord Reid's speech in *Hughes v. Lord Advocate* [1963] AC 837. The defendants left a manhole uncovered and protected only by a tent and paraffin lamp. A child climbed down the hole. When he came out he kicked over one of the lamps. It fell into the hole and caused an explosion. The child was burned. The Court of Session held that there was no liability. The House of Lords reversed the decision of the Court of Session. In the present case Lord Woolf MR [1998] 1 WLR 1546, 1551-1552 cited the following parts of the speech of Lord Reid, at pp. 845 and 847:
>
> > So we have (first) a duty owned by the workmen, (secondly) the fact that if they had done as they ought to have done there would have been no accident, and (thirdly) the fact that the injuries suffered by the appellant, though perhaps different in degree, did not differ in kind from injuries which might have resulted from an accident of a foreseeable nature. The ground on which this case has been

> decided against the appellant is that the accident was of an unforeseeable type. Of course, the pursuer has to prove that the defendant's fault caused the accident, and there could be a case where the intrusion of a new and unexpected factor could be regarded as the cause of the accident rather than the fault of the defendant. But that is not this case. The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way. (emphasis added by Lord Woolf MR)
>
> This accident was caused by a known source of danger, but caused in a way which could not have been foreseen, and, in my judgment, that affords no defence.

Lord Woolf MR observed that he had difficulty in reconciling these remarks with the approach in *Wagon Mound No. 1* [1961] AC 388. It is true that in *The Wagon Mound No. 1* Viscount Simonds at one stage observed, at p. 425:

> If, as admittedly it is, B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened – the damage in suit?

But this is to take one sentence in the judgment in *The Wagon Mound No. 1* out of context. Viscount Simonds was in no way suggesting that the precise manner of which the injury occurred nor its extent had to be foreseeable. And Lord Reid was saying no more. The speech of Lord Reid in *Hughes v. Lord Advocate* [1963] AC 837 is in harmony with the other judgments. It is not in conflict with *The Wagon Mound No. 1*. The scope of the two modifiers – the precise manner in which the injury came about and its extent – is not definitively answered by either *The Wagon Mound No. 1* or *Hughes v. Lord Advocate*. **It requires determination in the context of an intense focus on the circumstances of each case:** see Fleming, *Law of Torts*, 9th ed. (1998), pp. 240-243. (emphasis added.)

All the defendants before us accept the correctness of these decisions. But the main thrust of their attack is that the trial judge went wrong when he awarded damages for economic loss which was not consequent upon either physical harm or injury to property, ie, pure economic loss. To appreciate this argument, it is necessary to understand what it is exactly that the plaintiffs claimed. The essence of their case, shorn of the dressing that they attempted to disguise it with is that in consequence of the collapse of Block 1, the value of their apartments fell to such an extent that these are really worthless. Stripped of its disguise, the substance of the claim shows itself for what it really is – pure economic loss.

But it must not for a moment be assumed that pure economic loss is never recoverable. Quite the contrary. Under the Atkinian doctrine, loss of any type or description is recoverable, provided that it is reasonably foreseeable. That was made clear by Lord Oliver in *Murphy v. Brentwood District Council* [1990] 2 All ER 908, 933:

> *The critical question … is not the nature of the damage in itself, whether physical or pecuniary, but whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which the plaintiff claims to have sustained:* see *Caparo Industries plc v. Dickman* [1990] 2 AC 605. The essential question which has to be asked in every case, given that damage which is the essential ingredient of the action has occurred, is *whether the relationship between the plaintiff and the defendant is such, or, to use the favoured expression, whether it is of sufficient 'proximity', that it imposes on the latter a duty to take care to avoid or prevent that loss which has in fact been sustained.* That the requisite degree of proximity may be established in circumstances in which the plaintiff's injury results from his reliance on a statement or advice on which he was entitled to rely and on which it was contemplated that he would be likely to rely is clear from Hedley Byrne and subsequent cases, but Anns was not such a case and neither is the instant case. (emphasis added.)

Applying the guidance provided in the foregoing authorities, it is our judgment, that it is not the nature of the damage in itself, whether physical or pure financial loss, that is determinative of remoteness. The critical question is whether the scope of the duty of care in the circumstances of the case is such as to embrace damage of the kind which, a plaintiff claims to have sustained, whether it be pure economic loss or injury to person or property.

Here the trial judge had to ask himself the question whether pure economic loss to the plaintiffs was reasonably foreseeable by the 5th defendant, or indeed, any of the other defendants before us? But he did not himself ask that question. He held that as a matter of policy he could award pure economic loss. With respect we cannot agree. It is not the function of the court below or of this court to alter well-established law. That function is reserved to Parliament and in some cases to the Federal Court. We would therefore hold that the trial judge was wrong and overrule the case relied on by him, namely, *Dr. Abdul Hamid Rashid v. Jurusan Malaysian Consultants* [1999] 8 CLJ 131. We also take this opportunity to state that the case of *Pilba Trading & Agency v. South East Asia Insurance Bhd & Anor* [1999] 8 CLJ 403 was also wrongly decided and we therefore overrule it as well.

But that is not the end of the matter. The question is whether the plaintiffs are entitled to succeed nevertheless. In the instant case, it is clear from the facts as found by the trial judge (for which there is more than sufficient evidential backing) that it was within the reasonable foresight of the defendants before us that in the event of a landslide, some economic loss would ensue to the plaintiffs. Indeed, when his judgment is read as a whole it is evident that the judge had concluded that pure financial loss to the plaintiffs was reasonably foreseeable by the instant defendants. In our judgment it is more than a mere probability that property that is affected by a landslide occasioned by the negligence of the defendants before us will be worthless or worth far less than property that is not so affected.

There you have it. On the peculiar facts of this case, the kind of harm suffered by the plaintiffs was reasonably foreseeable. The defendants are therefore liable to the full extent of it. And that extent is the loss in value of their apartments in Blocks 2 and 3 in consequence of the collapse of Block 1. The trial judge however went further and made an award for several types of other damage eg, vandalism and theft by unknown third parties that was on any view of the matter, far too remote. See, *Smith v. Littlewoods Ltd* [1987] 2 WLR 480. We must disallow these losses. They are set out at the end of this judgment. But we affirm the judge's order to direct assessment on the loss in value of the apartments in question.

Learned counsel for the 5th defendant whose submissions counsel for all the other defendants adopted, cited several cases in an attempt to demonstrate that in those cases recovery of pure economic loss was not permitted. However, the cases cited were decisions on their own peculiar facts and provide no assistance to the present instance. We would accordingly adopt the response of Shankar J (as he then was) in *Public Prosecutor v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557, to the citation of authorities on an issue that is plainly one of fact:

> With respect to the industry of counsel and the DPP I feel I ought to say something here about the system of judicial precedent. That statements made by an accused person after his arrest are inadmissible, unless the statutory preconditions laid down by s. 37A of the Act are satisfied, is of course a matter of law. But whether in a particular case a person was under actual arrest at a given moment in time is a question of fact, to be decided according to the circumstances of each case. It is well established that the reasons given by a judge for arriving at a conclusion of fact, is not to be treated as law and therefore citable. Failure to appreciate this can result in the court being crushed under the weight of its own reports. (See *Qualcast (Wolverhampton) Ltd v. Haynes* [1959] AC 743 pp. 757, 758, 759 and 761.)

The Unpleaded Case Point

Learned counsel for the 5th defendant submitted that the plaintiffs pleaded case did not include an allegation that water was the main cause of the landslide. Their pleaded case was that it was a rotational retrogressive slide. He complained that the judge had found for the plaintiffs on quite a different case which neither side had advanced. The trial judge had, counsel argued, gone on a frolic of his own. As a result, the 5th defendant had been found liable on an unpleaded case which it had no opportunity of meeting at the trial. In support, reliance was placed on the leading case of *Hj Mohamed Dom v. Sakiman* [1956] MLJ 45, where the Court of Appeal (per Matthew CJ) held as follows:

> Nowhere in the pleadings is it alleged that the agreement was in the nature of a document of loan, and the case never proceeded on that basis. In my view, once he had found that the agreement for sale was a genuine document, the learned trial Judge had no alternative but to order specific performance of the agreement or to award damages. I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record, which in this case they were not, *Blay v. Pollard & Morris* [1930] 1 KB 628 (at p. 634).

Learned counsel for the plaintiffs has taken us through the relevant evidence available on the record to demonstrate how the respective cases were presented as well as the written argument directed upon the evidence. We are satisfied that all the evidence about water as a cause or a major cause was thoroughly investigated during the trial and that the lengthy written argument filed by all sides addressed the point sufficiently. It was only in its final part of the case, in its written argument, that the 5th defendant took objection for the first time to the change in tack by plaintiff's counsel. But by then all the relevant evidence on the point had been let in after intensive cross-examination by both sides of the relevant witnesses.

In *KEP Mohamed Ali v. KEP Mohamed Ismail* [1981] 2 MLJ 10 at p. 12, Raja Azlan Shah CJ (Malaya) said:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

In *Superintendent of Lands and Surveys (4th Div) & Anor v. Hamit bin Matusin & Ors* [1994] 3 CLJ 567, Peh Swee Chin SCJ said:

The underlying well-known rationale for requiring such material facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence, if allowed, will prejudice and embarrass or mislead the opposing party.

If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges, for such evidence to be disregarded by the court, and the court will then uphold such timely objection. The court will generally, however, grant an adjournment if requested, on suitable terms as to costs, etc, for the pleading to be amended by the party seeking to adduce such evidence. One must bear in mind the need for an orderly adversary system of a court trial, not a chaotic harangue in a market place.

A party is not taken by surprise when the circumstances actually indicate so, eg when such evidence is the very evidence sought to be relied on by him from the outset, or when he fails to object to such evidence then and there as this court now seeks to emphasise.

Thus, when a plaintiff had stated in her pleadings that she was 'lawfully walking along the proper side of the road', when in evidence, she said she was crossing the road when no vehicles were in sight, it was held by the Federal Court that that was not fatal to her claim when the defendant was not taken by surprise because the fact of her walking across the road was pleaded by the defendant in the defence and relied on at the very outset. Please see *Siti Aisha bte Ibrahim v. Goh Cheng Hwai* [1982] CLJ 544; [1982] CLJ (Rep) 326.

Applying the principles formulated in the foregoing cases to the facts of the present instance, we find that far from the 5th defendant being surprised, it had, by its conduct clearly entered upon the very issue, both during the evidence as well as in argument. It therefore suffered no prejudice whatsoever from the basis on which the trial judge approached the whole case and found for the plaintiffs. We therefore find no merit in the complaint that the trial judge had gone on a frolic of his own.

Title To Sue

Learned counsel for the 5th defendant in his opening address to us argued that even if the plaintiffs established their case against all the defendants, yet they could not succeed because they were not the owners of their respective apartments. Their apartments had no strata titles. The only "titles" they had were the respective sale and purchase agreements with the developer. But they had absolutely assigned these to each of several financial institutions that had assisted them in paying the purchase price.

But it must be said in fairness to learned counsel that when making his closing speech to us, with his customary frankness, conceded that for a plaintiff to succeed in the tort of negligence for damage to his immovable property, a mere possessory title would suffice. We think counsel is correct. He is supported by the decision in *The Aliakmon* [1986] 2 All ER 145 where it was held that for a plaintiff to succeed in an action for negligence for damage to his movable property, he must be the owner or have at least a possessory title to such property. In that case, Lord Brandon (with whom all the other Law Lords concurred) referred to a long line of authority which he said supported the proposition that:

> in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it. (p. 149)

It is axiomatic that for there to be a possessory title to immovable property there must in the first place be possession. "Possession" in law means exclusive possession. And exclusive possession means "either exclusive occupation or receipt of rents and profits": *Antoniades v. Villiers* [1988] 3 All ER 1058, 1061, per Lord Templeman. Further, "an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier": *Street v. Mountford* [1985] 2 All ER 289, 294, per Lord Templeman.

Applying this principle to the facts of the present instance, the requirement of exclusive possession was amply satisfied. Although the plaintiffs had assigned their sale agreements to various lending institutions they always had exclusive possession of their property. Mr. Abraham agreed during argument that the fact of assignment did not deprive the plaintiffs of exclusive possession. Were it otherwise, a bank manager might well be entitled to insist on the right to concurrent use of an apartment with the purchaser, a suggestion which learned counsel rightly accepted as being quite ridiculous. We accordingly have no difficulty in upholding the finding of the High Court that the plaintiffs had sufficient title to sue in the tort of negligence. However, we do so on a ground very different from that relied on by the trial judge.

Apportionment Of Liability

Mr. Abraham argued that even if his client was negligent, the apportionment of 30% to it was excessive. He said that the 1st as well as the other defendants must have been held liable to a much greater extent and that his client's liability if any must be only minimal.

Now, the question of apportionment of blame for an event is very much a matter for the primary trier of fact. It is a matter within his discretion. An appellate court will not interfere with his view unless it can be demonstrated to a conviction that he was wrong. As stated by Lord Diplock in *Collector of Land Revenue v. Alagappa Chettiar* [1971] 1 MLJ 43, p. 44:

> As in the case of appeals against assessments of damages or against apportionment of blame in actions for negligence an appellate court ought not to reject the judge's assessment and to embark upon a fresh valuation of its own unless it is satisfied for good reason that the judge's assessment must be wrong.

We are unable to say that on the material available to him the judge's assessment was wrong. In fact, after an examination of the evidence in the record of appeal, we are satisfied that his assessment was correct.

Joint Tortfeasors

Learned counsel for the 5th defendant also argued that even if his client was partly liable, it was not a joint tortfeasor and was therefore not liable to foot the whole bill before seeking contribution from the co-defendants.

The answer to this argument is to be found in the following passage in the judgment of Choor Singh J in *Oli Mohamed v. Keith Murphy & Anor* [1969] 2 MLJ 244, 245:

> Counsel for the second defendant submitted that if the court holds that both defendants were equally negligent, then the judgment against the second defendant should be only for 50 per cent of the total sum assessed as damages in this case. In my opinion this submission also fails. It is clear law that if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage. See *Dingle v. Associated Newspapers Ltd* [1961] 2 QB 162 and *Drinkwater v. Kimber* [1932] 2 QB 281. In *Dingle*'s case, Devlin LJ said at p. 188:
>
> > … Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These

> factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law …
>
> By the common law the plaintiff is entitled to recover the whole of the damages awarded in this case.

Our Federal Court in *Malaysian National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351, affirmed the common law principle. Edgar Joseph Jr. FCJ, a judge whose judgments are entitled to great respect said:

> To recapitulate, at common law, if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the same damage.

So too here. The plaintiffs are entitled as a matter of law to enforce the whole judgment against any of the defendants before us, including the 5th defendant. The argument of the 5th defendant cannot therefore be accepted.

Thus far we have dealt with the issue of negligence as forming the common complaint against all the defendants. But there are some special features as respects the other defendants. This we deal with now.

Negligence: The Fourth Defendant

There are two separate matters that we must address as regards the 4th defendant's liability. These are the pre-collapse and post collapse liability. As regards the former, the trial judge held that the 4th defendant owed a duty of care which it had breached. However, he indemnified the 4th defendant and held it harmless for such negligence by virtue of s. 95(2) of the Street Drainage and Building Act 1974. In respect of matters post-collapse, the judge found against the 4th defendant and made orders of a mandatory nature against it. We find it convenient first to deal with the 4th defendant's complaints as to matters post-collapse.

Now, assuming that there was a duty on the 4th defendant to act in a particular manner towards the property of the plaintiffs post collapse, such duty must find its expression in public and not private law. Accordingly, if there had been a failure on the part of the 4th defendant to do or not to do something as a public authority, the proper method is to proceed by way of an application for judicial review. See, *Trustees of the Dennis Rye Pension Fund & Anor v. Sheffield City Council* [1997] 4 All ER 747. Further, the substance of the order made against the 4th defendant appears to demand constant supervision and though this may no longer be a complete bar to the grant of a mandatory order, it is nevertheless a relevant consideration that must be kept in the forefront of the judicial mind. In the circumstances of this case, we are unable to see how such a duty as alleged to exist may be enforced in private law proceedings. It follows that this part of the judge's judgment cannot stand. It is set aside.

We must now look at the pre-collapse position of the 4th defendant. We do this under the cross-appeal lodged by the plaintiffs against the judge's grant of indemnity.

Section 95(2) of the Street Drainage and Building Act 1974 under which the 4th defendant took cover reads:

> (2) The State Authority, local authority and any public officer or officer or employee of the local authority shall not be subject to any action, claim, liabilities or demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act or any by-laws made thereunder or by reason of the fact that such building works or the plans thereof are subject to inspection and approval by the State Authority, local authority, or such public officer or officer or employee of the State Authority or the local authority and nothing in this Act or any by-laws made thereunder shall make it obligatory for the State Authority or the local authority to inspect any building, building works or materials or the site of any proposed building to ascertain that the provisions of this Act or any by-laws made thereunder are complied with or that plans, certificates and notices submitted to him are accurate.

Mr. Navaratnam, learned counsel for the plaintiffs has submitted that the section does not apply to the facts of the present instance. For, this is a case in which the 4th defendant directed the carrying out of certain works thereby creating a danger to the plaintiffs' property. Counsel is referring to the requirement by the 4th defendant that the East stream be diverted from its natural course. This is a fact as found by the trial court and amply borne out by the evidence, the relevant parts of which were read to us. Accordingly this is not merely a case of – to borrow the language of the section – inspection or approval of building or other works or the plans

thereof. This is a case where a danger was expressly created at the instance of the 4th defendant. We are therefore in agreement with learned counsel for the plaintiffs that the judge went wrong on the indemnity point.

In our judgment, there is no proposition of law that a local authority such as the 4th defendant may never owe a common law duty of care to a third party. It all depends on the particular circumstances. This is borne out by the following passage from the speech of Lord Hutton in *Barrett v. Enfield London Borough Council* [1999] 3 All ER 193, 216:

> In some circumstances the exercise of a statutory duty or power may itself create the relationship between the plaintiff and the defendant which causes the common law duty of care to come into existence. This was made clear in the judgment of Lord Greene MR in *Fisher v. Ruislip-Northwood UDC* [1945] 2 All ER 458, [1945] KB 584 where a local authority was held liable for common law negligence for failing to light an air-raid shelter erected on the highway in pursuance of statutory powers. Lord Greene MR stated ([1945] 2 All ER 458 at 462, [1945] KB 584 at 595):
>
> > Negligence is the breach of a duty to take care. That duty arises by reason of a relationship in which one person stands to another. Such a relationship may arise in a variety of circumstances. It will, to take a simple instance, arise when a person exercises his common law right to use the highway – by doing so he places himself in a relationship to other users of the highway which imposes upon him a duty to take care. Similarly, if the right which is being exercised is not a common law right but a statutory right, a duty to use care in its exercise arises, unless, on the true construction of the statute, it is possible to say that the duty is excluded.
>
> And ([1945] 2 All ER 458 at 472-473, [1945] KB 584 at 615):
>
> > … I think that the suggested distinction between a statutory power and a common law power does not exist where all that the statute does is to authorise in general terms the construction of an obstacle on the highway which will be a danger to the public unless precautions are taken. To repeat what I ventured to say earlier in this judgment, the undertakers in each case, by exercising a power, in the one case statutory, and in the other at common law, place themselves in a relationship to the public which from its very nature imports a duty to take care.
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> And in *Home Office v. Dorset Yacht Co Ltd* [1970] 2 All ER 294 at 322, [1970] AC 1004 at 1056 Lord Pearson said:

> Be it assumed that the Home Office's officers were acting in pursuance of statutory powers (or statutory duties which must include powers) in bringing the borstal boys to Brownsea Island to work there under the supervision and control of the Home Office's officers. No complaint could be made of the Home Office's officers doing that. But in doing that they had a duty to the respondents as 'neighbours' to make proper exercise of the powers of supervision and control for the purpose of preventing damage to the respondents as 'neighbours'.

In the High Court of Australia in *Sutherland Shire Council v. Heyman* [1985] 157 CLR 424 at 459 Mason J stated:

> And at least since the decision in *Fisher v. Ruislip-Northwood Urban District Council and Middlesex County Council*, it has been generally accepted that, unless the statute manifests a contrary intention, a public authority which enters upon an exercise of statutory power may place itself in a relationship to members of the public which imports a common law duty to take care.

See also Brennan J (at 479).

Therefore the fact that the defendant's relationship with the plaintiff arose from the exercise of a statutory power does not prevent the plaintiff from claiming that the defendant owed him a common law duty of care, unless the defendant is entitled to contend that the claim is barred because it alleges negligence in the exercise of a discretion given by statute.

As to the effect of the act of the 4th defendant in directing the 1st defendant to create a danger, we need do no more than refer to the judgment of Simon Brown LJ in *Kane v. New Forest District Council* [2001] 3 All ER 914, 920:

> [27] I would reject this argument. It is plain that *Stovin v. Wise* proceeded upon the basis 'that the complaint against the council was not about anything which it had done to make the highway dangerous, but about its omission to make it safer' ([1996] 3 All ER 801 at 818, [1996] AC 923 at 943 per Lord Hoffmann in the leading speech for the majority) – or (as Lord Nicholls put it in the leading speech for the minority):
>
> > The starting point is that the council did not create the source of danger. This is not a case of a highway authority carrying out road works carelessly and thereby creating a hazard. In the present case the council cannot be liable unless it was under a duty requiring it to act. If the plaintiff is to succeed the council must have owed him a duty to exercise its powers regarding a danger known to it but not created by it. (See [1996] 3 All ER 801 at 806, [1996] AC 923 at 929.)

> [28] Here, by contrast, the starting point must surely be that the respondent council did create the source of danger. They it was who required this footpath to be constructed. I cannot accept that in these circumstances they were entitled to wash their hands of that danger and simply leave it to others to cure it by improving the sightlines. It is one thing to say that at the time when the respondents required the construction of this footpath they had every reason to suppose that the improvements along 'The White Cottage' frontage would ultimately allow it to be safely opened and used: quite another to say that they were later entitled to stand idly by whilst, as they must have known, the footpath lay open to the public in a recognisably dangerous state.

If the local authority in *Kane v. New Forest District Council (supra)* could not wash its hands off the danger in the footpath it required to be constructed, we are unable to see how the 4th defendant could possibly escape liability in the present case for requiring the diversion of the East stream. Accordingly, we set aside the indemnity granted to the 4th defendant by the trial judge. The consequence is that the 4th defendant is liable to the plaintiffs in the tort of negligence. We would add for good measure that the kind of harm that was foreseeable by the 5th defendant was equally foreseeable by the 4th defendant. Upon the evidence on record and applying to it the relevant principles already referred to earlier in this judgment, it is clear that the 4th defendant must as a reasonable local authority foreseen the danger created by diverting the East stream would probably cause a landslide of the kind that happened and that in such event, resultant harm, including financial loss of the kind suffered by the plaintiffs would occur. We would in the circumstances uphold the apportionment of liability as against the 4th defendant.

An additional point was raised by counsel for the 4th defendant. It was not pursued by him with any enthusiasm. It has to do with the question whether the action against the 4th defendant is barred by limitation, in particular by the Public Authorities Protection Act 1948. The short answer is that it is not because this is a case of continuing harm. And the authority in support for the view we take is *Mak Koon Yong & Anor v. Municipal Councillors, Malacca* [1967] 1 MLJ 256, where Wan Suleiman J (as he then was) said:

> In the case of *Carey v. Metropolitan Borough of Bermondsey* 20 TLR Court of Appeal held in respect of that section of the English Act which is in pari materia with our section 2(a) that "the language of the section was reasonably plain and it was manifest that the continuance of the injury or damage meant the continuance of the act which caused the damage." Time would therefore begin to run for the purposes of the Ordinance, from

the time when the act was caused, not from the time when the injury or damage ceased, or in the case of a continuing injury or damage, when the act causing the injury or damage ceased.

For the defendants it was submitted that the time began to run from 23rd December 1961, the day on which plaintiffs' architect was informed by the municipal engineer that the amended plan No. 9322 would not be approved. On behalf of the plaintiffs it was argued that time began to run only from 27th June 1962 when the municipal engineer approved the amended plan. Until then there had been a continuation of the refusal, the act which they claim caused the damage. Since the writ was issued on 27th April 1963 plaintiffs contended that the suit had been commenced within time.

If the refusal to approve the amended plan, by the defendants was actionable, it is my view that there had indeed been a continuation of the act, and that therefore the plaintiffs were correct in saying that the act causing damage ceased only from 27th June 1962. It would then follow that this suit is not time-barred cannot affect the outcome.

One last point. It has to do with the plaintiffs' claim for breach of statutory duty. No argument was directed on the point by either side. We therefore find it unnecessary to deal with this part of the case.

Negligence And The Other Defendants

As regards the 3rd, 7th and 8th defendants, their respective counsel submitted that their clients ought to have been absolved of any blame. With respect, we do not agree. Their respective roles in the events that led to the tragedy have been dealt with by the trial judge in sufficient detail. We unable to detect any appealable error in the way in which the judge dealt with their cases.

Liability In Nuisance

By reason of the views we have expressed on the trial judge's finding on negligence, we need have said little or nothing on the issue of nuisance. But in deference to the efforts of counsel for the 5th defendant and the plaintiffs we think we should deal with this issue. However, as a substantial portion of the evidentiary material led on the issue of negligence was also used on the case mounted in nuisance we will not rehearse it here.

Only two points of importance were made during argument. First, whether a case of actionable nuisance had been made out. Second, whether pure economic loss is recoverable in the tort of nuisance.

We apprehend that a comprehensive answer to both issues is provided by the speeches in *Hunter v. Canary Wharf Ltd.* [1997] 2 WLR 684. Our own views upon the subject are expressed in that case so that we need do no more than to quote from the speech of Lord Lloyd of Berwick.

First a passage at p. 698:

> Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land. In cases (1) and (2) it is the owner, or the occupier with the right to exclusive possession, who is entitled to sue. It has never, so far as I know, been suggested that anyone else can sue, for example, a visitor or a lodger; and the reason is not far to seek. For the basis of the cause of action in cases (1) and (2) is damage to the land itself, whether by encroachment or by direct physical injury.
>
> In the case of encroachment the plaintiff may have a remedy by way of abatement. In other cases he may be entitled to an injunction. But where he claims damages, the measure of damages in cases (1) and (2) will be the diminution in the value of the land. This will usually (though not always) be equal to the cost of reinstatement. The loss resulting from diminution in the value of the land is a loss suffered by the owner or occupier with the exclusive right to possession (as the case may be) or both, since it is they alone who have a proprietary interest, or stake, in the land. So it is they alone who can bring an action to recover the loss.

Next a passage at p. 699 where he speaks about the kind of damage recoverable in the tort. He said (at p. 699):

> It has been said that an actionable nuisance is incapable of exact definition. But the essence of private nuisance is easy enough to identify, and it is the same in all three classes of private nuisance, namely, interference with land or the enjoyment of land. In the case of nuisances within class (1) or (2) **the measure of damages is, as I have said, the diminution in the value of the land. Exactly the same should be true of nuisances within class (3)**. There is no difference of principle. The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no diminution in the market value. But-there will certainly be loss of amenity value so long as the nuisance lasts. If that be the right – approach, then the reduction in amenity value is the same whether the land is occupied by the family man or the bachelor. (emphasis added.)

There you have it. Pure economic loss in the form of the fall in the value of the land is recoverable for any of the forms of nuisance recognised by the law.

What remains is to see whether the 5th defendant did in fact cause the nuisance. We have already referred to the failure of this defendant to maintain the drains in question. That this amounts to a nuisance was established by the leading case on the subject, *Sedleigh Denfield v. O' Callaghan* [1940] AC 880, where at p. 887 Viscount Maugham said:

> An owner or an occupier of land constantly leaves such a matter as the cleaning out of ditches and drains on his land to persons employed by him to look after such things, and he would generally not expect, nor would he receive, detailed reports in regard to them. The culvert opening and the ditch were perfectly open to view for most of the time. In these circumstances I have formed the opinion in which I think all your Lordships agree that before the flood of April, 1937, the respondents must be taken to have knowledge of the existence of the unguarded culvert which for nearly three years had been the means by which the water coming down the ditch on the respondents' land had flowed away to the sewer in Lawrence Street. All that is necessary in such a case is to show that the owner or occupier of the land with such a possible cause of nuisance upon it knows or must be taken to know of it. An absentee owner or an occupier oblivious of what is happening under his eyes is in no better position than the man who looks after his property including such necessary adjuncts to it in such a case as we are considering as its hedges and ditches.

As we observed during argument, Viscount Maugham may well have been speaking about the 5th defendant in the present context.

That brings us to the question of the test of remoteness to be applied in cases of nuisance. We find that it is the same as that in negligence.

In *Ling Nam Rubber Works v. Leong Bee & Co* [1968] 1 MLJ 216 (affirmed by the Privy Council in [1970] 2 MLJ 45), Ong Hock Thye FJ said:

> The nice distinctions between the torts of nuisance and negligence are often not easily perceived; indeed the two have not infrequently been somewhat confused in the past: see on this point the Privy Council judgments of Lord Reid in *The Wagon Mound (No 2)* [1966] 2 All ER 710 and of Lord Wilberforce in *Goldman v. Hargrave* [1966] 2 All ER 989, 992, in which latter case his Lordship made the following observation:
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> > As this Board has recently explained in *The Wagon Mound (No 2), Overseas Tankship (UK) Ltd v. The Miller Steamship Co Pty Ltd* [1966] 2 All ER 710, the tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive.

> There is, however, one common feature of liability, both in negligence and nuisance, for which one need only refer conveniently to *The Wagon Mound (No 1)* [1961] 1 All ER 404, 415 and *The Wagon Mound (No. 2).* The test is the same for each tort, namely foreseeability of the damage. Thus, it was laid down in *The Wagon Mound (No. 1)* at p. 415 that in negligence 'the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen'. Then, in *The Wagon Mound (No. 2),* at p. 717, it was affirmed that 'it is not sufficient that the injury suffered … was the direct result of the nuisance if that injury was in the relevant sense unforeseeable.

Reading the foregoing passage with the speech of Lord Lloyd in *Hunter v. Canary Wharf Ltd (supra)* and applying them to the facts of this case, it is beyond argument that the pure economic loss suffered by the plaintiffs, that is, the fall in the value of their respective apartments is recoverable.

Summary

To summarise, we find this to be a case which involves pure findings of fact. We have carefully examined the judgement of the trial judge and find no significant error that brings this case within any of those categories of rare cases in which appellate intervention takes place. Such errors in the judge's judgment as we have discovered and corrected herein are not errors of fact at all. They are errors of law. They do not affect the core findings on the liability of the defendants before us.

In any event, having scrutinised the appeal records, we find ourselves in agreement with the court below on the findings of fact arrived at by it. Those findings are amply supported by the oral and documentary evidence adduced in the case. We are not therefore in a position to disturb those findings.

The Result

For the reasons already given, these appeals cannot succeed on any of the issues raised. The only qualification we make is in respect of damages which we will deal with in a moment.

The orders we make are as follows.

The appeals of the 3rd, 5th, 7th and 8th defendants are hereby dismissed. We affirm the findings made by the court below against each of these defendants.

The appeal by the 4th defendant in respect of the post-collapse liability is hereby allowed and the orders of the court below only in that respect are set aside.

The cross-appeal by the plaintiffs against the order granting indemnity to the 4th defendant for pre-collapse liability is hereby allowed.

We affirm the apportionment of liability made by the court below amongst the defendants.

The 3rd, 5th, 7th and 8th defendants will pay the plaintiffs their costs of their respective appeals. As between the plaintiffs and the 4th defendant, each side will bear its own costs in its appeal. But the order for costs made against the 4th defendant in the court below shall stand undisturbed.

Although the plaintiffs shall be entitled to present individual bills against each defendant, we direct that only one sum for getting up be allowed by the taxing registrar against all the defendants (save the 4th defendant) in respect of these appeals.

The deposit paid by each defendant (save the 4th defendant) before us will be paid out to the plaintiffs to account of their taxed costs. The 4th defendant's deposit shall be refunded to it.

We affirm the direction by the court below to have the plaintiffs' damages assessed, but by the registrar. The trial judge's order is varied to this extent. However, such assessment shall be confined only to general damages for the loss in value of their respective apartments and all consequential loss flowing therefrom, if any.

The plaintiffs shall also have interest on their damages from 11 December 1993 until the date of settlement at the rate of 8% per annum.

Before concluding, we wish to thank all counsel for the assistance they have rendered us in these appeals.